Pages 1 - 17

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ORRICK

FINJAN, INC.   )
)
)
            Plaintiff,   )
)
  vs.   ) No. C 18-2621 WHO
)
CHECK POINT SOFTWARE TECHNOLOGIES,   )
INC.   )
) San Francisco, California
            Defendant.   ) Wednesday
) February 13, 2019
_____) 2:00 p.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: KRAMER LEVIN NAFTALIS & FRANKEL LLP
                            990 Marsh Road
                            Menlo Park, CA 94025
                        BY: **JAMES R. HANNAH, ESQ.**
                            KRISTOPHER BENJAMIN KASTENS, ESQ.

For Defendant: ORRICK, HERRINGTON & SUTCLIFFE LLP
                            405 Howard Street
                            San Francisco, CA 94105
                        BY: **CLEMENT S. ROBERTS, ESQ.**

                            ORRICK, HERRINGTON & SUTCLIFFE
                            1000 Marsh Road
                            Menlo Park, California 94025
                        BY: **EVAN DAVID BREWER, ESQ.**

Reported By: *Debra L. Pas, CSR 11916, CRR, RMR, RPR*
                  Official Reporter - US District Court
                  Computerized Transcription By Eclipse

Debra L. Pas, CSR, RPR, RMR, CRR
Official Reporter - U.S. District Court - San Francisco
(415) 431-1477

1   **Wednesday - February 13, 2019**   **2:14 p.m.**

2   **P R O C E E D I N G S**

3   **---000---**

4   **THE CLERK:** Calling Civil Matter 18-2621, Finjan,

5   Incorporated versus Check Point Software Technologies,

6   Incorporated.

7   Counsel, please come forward and state your appearance.

8   **MR. ROBERTS:** Good morning, Your Honor. Clem Roberts

9   from Orrick Herrington for the defendant Check Point Software

10   Technologies.

11   **MR. HANNAH:** Good morning, Your Honor. James Hannah

12   on behalf of Finjan, and with me is Chris Kastens. He will be

13   handling the majority of the argument today.

14   **THE COURT:** Mr. Hannah, I've seen you before.

15   **MR. HANNAH:** Yes. Nice to see you, Your Honor.

16   **THE COURT:** Nice to see you. I hope that my comment

17   at the first case management session was passed on to you.

18   **MR. HANNAH:** It was, Your Honor. And I have to say

19   that at every subsequent trial I have made sure not to make any

20   assumptions any more and definitely took it to heart. So thank

21   you, your Honor.

22   **THE COURT:** All right. So let me tell you what I

23   think about the motion. I'm inclined to grant in almost all

24   ways the motion to strike.

25   Finjan needs to organize its infringement contentions by

1   the underlying instrumentalities to crystalize the contentions.

2   If the underlying instrumentalities infringe in combination,

3   the combination needs to be specified. Pinpoint citations need

4   to be specific, particularly to where and how each limitation

5   of each asserted claim is found within the accused

6   instrumentality.

7   It's not sufficient to cite multiple sets of source code

8   under each claim limitation without explanation. The public

9   information that's cited isn't sufficient to cure the problem.

10   And I don't think blaming Check Point is a useful way to

11   resolve this problem. If there was a problem in getting

12   technical documents, you shouldn't have waited until the last

13   two days before the deadline to serve contentions.

14   And I think, Mr. Hannah, we had something similar in

15   that -- the trial before. I think a similar kind of issue came

16   up.

17   In any event, regarding the open-ended contentions, Finjan

18   can't reserve any undisclosed theories of infringement. It

19   needs to cite the relevant source code to crystallize its

20   claims.

21   So as long as Finjan corrects all of those things and

22   identifies the source code properly, I'm not going to strike

23   any new instrumentalities. But everything has to be laid out

24   in a very clear manner, which it doesn't appear that it has

25   been.

1   So I'm happy to hear argument with respect to that.

2   **MR. KASTENS:** Your Honor, I would just respectfully

3   request that we have an opportunity to depose their engineer,

4   who was the one who said that we didn't cite source code for

5   particular products. Our understanding is that we did cite

6   source code for the products and anything that we had accused.

7   So we would like to determine the basis that they made that

8   representation. A lot of his analysis was a black box where he

9   just said they didn't cite source code for these following

10   products without explaining.

11   I think as we tried to lay out in our brief, they have

12   usually just one directory for all the source code. They will

13   have one software package that they give to their customers.

14   The customers can then enable different features in that. They

15   call those different features products and they rely on a lot

16   of source code that is within the same directory and is not

17   labeled as being related to any product. So we would just ask

18   to have the opportunity to depose somebody, a 30(b)(6) witness,

19   regarding the structure of their source code and then we can

20   supplement within 45 days of that to address that.

21   **THE COURT:** Mr. Roberts.

22   **MR. ROBERTS:** Yeah. So this is difficult for me

23   because the -- we addressed this at the very beginning of the

24   case, and we said we would like contentions that give us the

25   theories of the case. Those are necessary, among other things,

1   to prepare witnesses for deposition.

2   I mean, saying you get nothing from us in this giant

3   confusing mass and then we want to take the deposition where

4   you have no way to prepare the guy to even know what the

5   theories are, and then after I've taken your 30(b)(6)

6   witness -- which, by the way, they only said they wanted the

7   30(b)(6) for the first time yesterday. That was the very first

8   time. This is now February, where they served an email -- by

9   email, not even a notice -- where they said we want to take the

10   30(b)(6) depo.

11   So, I mean, on one hand, yeah, they ought to be able to

12   get some information about the products at some point, but the

13   initial contentions, what their theories are, I don't know that

14   they need to take the 30(b)(6) witness or the senior architect

15   in order to tell us what their infringement contentions are.

16   You always have good cause to amend if you disclose new things

17   afterwards.

18   But if they brought this case, they ought to be able to at

19   the outset say how we infringe and have some theory of it.

20   They've had months now with the source code. They asked to

21   come back and see the source code on a Friday. We said no

22   problem. Then they came in and they saw it again on Monday.

23   That was two weeks ago. Why are we now in February where all

24   of a sudden for the very first time, okay, now you got us. Now

25   we want to take a whole bunch of discovery before we tell you

1   what our theories are.

2   So on one hand, Your Honor, I'm reluctant to say no, but

3   on the other hand, I sort of feel like they ought to give us

4   their theories and then take the deposition so I can adequately

5   prepare the witness.

6   **MR. KASTENS:**   Your Honor, I believe our theories are

7   what we -- our contentions for infringement are fully disclosed

8   within the charts. If you're interested in something that is a

9   little bit more digestible and easier to understand, I think we

10 can abide by that, but what our contentions are is fully laid

11 out.

12   In their briefing, t hey just -- they completely ignore,

13 you know, the public information that we do where it points to

14 what we're accusing and then we follow with source code

15 citations to address those.

16   And then, you know, for the source code citations I would

17 just like to comment that we do identify specific files and

18 line numbers within those files. A lot of time there is more

19 source code than multiple files that will enable certain

20 functionality or a component within the source code. So that's

21 why we would have had laid it out like that to address. I

22 don't think we did overarching source code citations.

23   I was at the case that you referenced for Mr. Hannah as

24 well. I think the issue was there that we would cite whole

25 source code directories. We have not done that. We have cited

1   specific source code files and had some narrative to describe

2   what those files implement.

3   **MR. ROBERTS:** Can I respond to that as a factual

4   matter, because I think it would be helpful.

5   **THE COURT:** Sure.

6   **MR. ROBERTS:** This is their Exhibit F, if I could

7   hand this up.

8   **THE COURT:** Is this going to be meaningful to me,

9   Mr. Roberts?

10   **MR. ROBERTS:** I think so, I think so.

11   (Whereupon document was tendered to the Court.)

12   **MR. ROBERTS:** So this is not an example I've chosen.

13   This is the example they chose in their opposition brief about

14   what they did that they thought was really good. So this was

15   their cherry-picked example of the good job they did.

16   So if you turn to just page one, Your Honor, of Appendix

17   F-2, it lists by saying what the accused products are. And you

18   can see it says, this is the second paragraph:

19   "For purposes of this chart Endpoint Enterprise

20   products include the following subscription services

21   or products."

22   And then there is a big long list of products. "SandBlast

23   Agent package, Compliance package, Next Generation AV,

24   Protection package." A whole bunch of other things.

25   And then it says it includes the following blades. And

1   there is one, two, three, four, five, six, seven, eight, nine,

2   ten -- 12, 13 blades.

3   And then it says, it also is accusing:

4   "The use of cloud services which provide threat

5   intelligence feeds to Endpoint Enterprise products" --

6   so now we have a category of technology -- "and a

7   download or browser protection feature or similar

8   feature which blocks files before they are downloaded

9   to the end-user computer."

10   And then below that it says:

11   "As identified and described element by element

12   below Endpoint Enterprise products individually or in

13   combination with Check Point's cloud services,

14   footnote two, infringe the following claims."

15   And the footnote says that the cloud services, which is an

16   entire other chart with another 50 products in it, is

17   incorporated entirely by reference into this.

18   So the point here, Your Honor, is that just at the

19   beginning what we have is an amalgamation of products and an

20   amalgamation of charts.

21   If you look at the -- I think it's *GeoVector* case that

22   Your Honor, I'm sure, is familiar with, in that case -- this is

23   the exact same thing, but it's worse because they are

24   amalgamating a huge amount of products.

25   Now, opposing counsel said, well, we gave them specific

1   source code citations. If I could ask Your Honor to look down

2   in this, starting at -- I want to start at limitation B-1,

3   because this is the one that was used. This is Page 10 of this

4   first thing. This is "receiving by an inspector a

5   downloadable," starting on Page 10.

6   And then if you look down, the source code citations begin

7   on Page 19. And you will see the source code citations take up

8   19, 20, 21, 22, 23, 24, 25, 26 and half of 27.

9   And what they said in their brief, in their opposition, is

10   that if you turn to Page 25, in the middle of the page there is

11   a statement that says "This file implements a Chrome extension

12   manager" and it cites the file. And they say voila, pinpoint

13   source code citation.

14   What they've done is they have given me literally 90

15   citations and then in the brief they said, oh, you should have

16   known that this was the needle we were pointing at. But that's

17   impossible because, among other things, all 90 of these are

18   copied into every single limitation of every single claim,

19   including the one that they now point to.

20   So when opposing counsel says, we gave them very clear

21   descriptions of what the source code was, we weren't citing to

22   whole directories. They cited to 90 entire files and then they

23   cited those same 90 files for every limitation. There is no

24   way for me to know what they pointed to.

25   And how am I supposed to prepare Mr. Zegman. This is

1   millions of lines of code; right? How am I supposed to prepare

2   anyone to testify about this stuff? Unless we have some

3   reasonably cognizable infringement theory, I don't know how I

4   prepare a witness.

5   **MR. KASTENS:** Can I respond, Your Honor?

6   **THE COURT:** Please. Because I don't know either.

7   **MR. KASTENS:** So, your Honor, what we've asked is

8   their -- what their witnesses already claim to know, which is

9   these products -- like, what we're contending in our products

10   mapped to, like, are within the source code directories. He's

11   already submitted a declaration saying, hey, what you've cited

12   don't correspond to what we're saying are these specific

13   products.

14   That's the deposition that we would take, is give us the

15   basis for why you're saying that. Because we spent a lot of

16   time to put these together and we've gone through the source

17   code, gone through the public documents. We organized it, how

18   they represent this stuff to their customers and it matches

19   with how it's organized within the source code.

20   So that's what we would request, is just the basis of

21   these tables that he puts in here where he says, oh, you don't

22   have these four things, but you have these five things, and he

23   doesn't actually say why. He just says that these aren't --

24   the source code for these aren't cited. That's it.

25   So I don't see why -- he's already declared that, so I

1   don't see any reason that he wouldn't be able to explain how he

2   reached those conclusions in a deposition.

3   **THE COURT:** So the problem that I see with this --

4   and I'm not sure whether it's an actual problem or not, so you

5   have can tell me that -- is the cart before the horse problem.

6   You've got to lay out your contentions and, and it's not up to

7   Check Point to educate you in a way that will help you build

8   your case at the outset unless, you know, in the course of

9   discovery and for good cause and things could change.

10   So I am sympathetic to needing some sort of factual

11   background so that you can clarify your claims, but I'm not

12   interested in sort of substantive discovery. And I don't know

13   how to draw that line.

14   **MR. ROBERTS:** We gave them -- I mean, your Honor,

15   they have the code, which I believe a person of ordinary skill

16   in the art spending a bunch of time ought to be able to read.

17   We gave them all of the manuals for the product. There is a

18   thousand confidential documents that are on there that are

19   responsive. They have said, oh, we need more documents, but

20   they never said specifically what documents they need. Like, I

21   still don't know what additional documents they claim to need.

22   So I don't -- I mean, my problem is I worry that this is

23   all just a smoke screen. And the reason I have that concern is

24   that we see the same pattern in every Finjan case. We put in a

25   supplemental authority, the decision from Judge Tigar, they are

1   on their third set of contentions and they still don't know

2   what they're talking about. And here we are, like, heading

3   into claim construction. I have to pick the five terms that

4   are most important to me and I don't even know what the

5   theories are. How am I supposed to pick those five terms and

6   then come to court and say, yeah, these are what the

7   constructions ought to be, because I don't even know.

8   **THE COURT:** Okay. So what's your proposal to help

9   get past this place, Mr. Roberts?

10   **MR. ROBERTS:** My proposal is that -- is exactly the

11   order that Your Honor read at the outset, which is that they

12   give us adequate infringement contentions that satisfy the

13   local rules in the ways that you said.

14   After that, if they want to take a deposition and they

15   believe that they have good cause to amend because now they

16   know something that they didn't know before, fine. Fine.

17   That's -- that's the way it's supposed to work.

18   They have had -- before doing their initial infringement

19   contentions in the case they had the source code. That's not

20   usually the case. Usually you have to do your infringement

21   contentions without the source code. But here we gave them all

22   of the source code. I gave them a list of products. I pointed

23   them to the price list on the website and said here are the

24   products. Here is what we think could possibly be at issue in

25   the case. That's not every product we made. But I said, here

1   is what we think are possibility at issue in the case.

2   I have been trying to help them in exactly this way. I

3   mean. not too much. We're opposing counsel, but I have been

4   trying to remove the excuse --

5   **THE COURT:** You have been very helpful throughout

6   this entire procedure.

7   **MR. ROBERTS:** I mean, I have been trying to remove

8   the excuses; right? I have been trying to say: Here, have the

9   source code. Take the time you need. Here is what we think is

10   at issue. If you disagree, if there are other things, let us

11   know.

12   So I have been trying to be favor about it, is what I

13   would say.

14   **THE COURT:** Mr. Kastens.

15   **MR. KASTENS:** Your Honor, I think what we're asking

16   for is pretty clear. We just -- we want a deposition where

17   their person will say, okay, here are -- what we say in

18   marketing are different products that we sell. And here in

19   this source code that's one folder where -- that is not labeled

20   by any of the products names that they sell, where the source

21   code is for those products. That shouldn't -- I mean, that

22   doesn't require anything regarding our contentions to identify.

23   He's already done that in his declaration.

24   He submitted a declaration which he said, you didn't

25   identify source code for these products. We think we did. So

1   he doesn't say why he says that. He just said we didn't. And

2   so we're just going to go through and have him explain, okay,

3   where are you saying the source code for this product is? You

4   know, it's -- you know, you say it wasn't cited in here. Can

5   you identify where it is?

6   THE COURT: Here is what we're going to do. I'm

7   going to stick with my tentative and have you amend in the best

8   way that you can given the information you have.

9   Then I want you to meet-and-confer with Mr. Roberts and

10   see whether you can agree on anything that will provide -- if

11   Mr. Roberts still claims that the contentions are insufficient,

12   what it is that can happen in order to get over the -- this

13   particular hurdle. If you're unsuccessful, then I want you to

14   send -- send me a five page joint letter and append to it the

15   questions that you would like to ask a 30(b)(6) witness. And

16   then -- or the places where you're in disagreement, and I'll

17   decide that.

18   MR. ROBERTS: Very good. May I address one final

19   point, Your Honor, which is for the products that were not

20   cited, meaning they provided no source code citations for them,

21   are those products in the case or not in the case? Can they

22   amend and accuse and expand and add a whole bunch of new

23   products to the case if they haven't given us any citations to

24   the source code here?

25   THE COURT: Well, you just told me you didn't know

1   what they had given you. So the answer is, if they give you --

2   if they can specify what this case is about and what they are

3   going after, that's okay this time around.

4   MR. ROBERTS: Okay.

5   THE COURT: Okay. So how quickly can you amend?

6   MR. KASTENS: Your Honor, we've served

7   interrogatories requesting that they, a couple weeks ago, match

8   the source code to the products that are accused in this case.

9   We can do it within 45 days of getting a response where we

10 could respond to that discovery, I believe.

11   MR. ROBERTS: That's extraordinary, because what he's

12 just saying is they can't even give infringement contentions

13 that meet the local rules or that satisfy the Court's order

14 until we answer discovery and map all of the code to all of the

15 products for them. That's extraordinary.

16   MR. KASTENS: We're just --

17   MR. ROBERTS: Why is it that -- I apologize. I don't

18 mean to interrupt you.

19   Why is it -- why is it that I have to do all of this work

20 for them before I even know what it is I'm accused of

21 infringing?

22   THE COURT: Well, you're in litigation. That's one

23 reason.

24   MR. KASTENS: I think he keeps kind of doing a straw

25 man argument of what I'm requesting.

1   So they say they have these 40 -- they say they have these

2   different products, okay. What they are -- what we tried to

3   explain in our briefing is their source code directory where

4   they say are 40 products is one directory. None of them are

5   labeled as a specific product. We understand, based on the

6   functionality that they disclosed within their public

7   documents, that we've identified the source code corresponding

8   to those particular marketing names of their products, which

9   they are asking us to organize by.

10   So, but they -- all we're asking is you've said -- you've

11   already said that these source -- that you know which source

12   code matches up to allegedly which of these, you know,

13   different ways that you say that are products. So just give us

14   that information. That's all we ask for.

15   It's not asking for any analysis. It's just why are you

16   saying that this source code, which looks like it, provides the

17   functionality for this product that you market under this

18   marketing name, why are you saying that the source code doesn't

19   actually go to that product.

20   **MR. ROBERTS:** Right. Teach me how the source code

21   works.

22   **MR. KASTENS:** That's not how what I'm asking, Your

23   Honor.

24   **THE COURT:** All right. Mr. Roberts, what is your

25   proposal for how long Finjan gets? Because what I'm going to

1 do is stop listening to both of you and send you out -- and

2 I'll send something out.

3   MR. ROBERTS: I don't have a problem with 45 days.

4 My only problem really is the calendar. And so what we had

5 done is submitted a motion suggesting that the claim

6 construction dates be pushed off.

7   So what I would propose is we actually just put a

8 tentative like pin, pause. If they need 45 days, that's fine.

9 But let's just push the dates off by 45 days so that we're not

10 trying to make decisions without the information.

11   THE COURT: I will grant that, that we're going to

12 get -- we've got to get over this hurdle. And I'm going to

13 force you over the hurdle one way or another.

14   MR. ROBERTS: Lovely.

15   THE COURT: Okay. Thanks for coming in.

16   MR. ROBERTS: Thanks so much.

17   MR. HANNAH: Thank you, Your Honor.

18   (Proceedings adjourned.)

19

20

21

22

23

24

25

CERTIFICATE OF OFFICIAL REPORTER

 I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, March 1, 2019